

FCC MAIL ROOM

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of

Forbearance from Applying Provisions of the
Communications Act to Wireless
Telecommunications Carriers

WT Docket No. 98-100

SECOND REPORT AND ORDER**Adopted: August 7, 2003****Released: August 20, 2003**

By the Commission

I. INTRODUCTION

I In this Second Report and Order, we decline, with two limited exceptions, to forbear any further from applying provisions of the Telephone Operator Consumer Services Improvement Act (TOCSIA)¹ to commercial mobile radio services (CMRS) aggregators and operator service providers (OSPs). On July 2, 1998, the Commission released the *PCIA Forbearance Order and Notice*.² In the *PCIA Forbearance Order*, the Commission decided to forbear from applying TOCSIA provisions that require CMRS aggregators and OSPs to provide unblocked access and to file informational tariffs.³ In the *Notice*, the Commission requested comment regarding whether, pursuant to Sections 10 and 332(c)(1)(A) of the Communications Act of 1934, as amended (the Act),⁴ the Commission should forbear any further from applying TOCSIA and the Commission's implementing regulations⁵ to CMRS aggregators and OSPs.⁶ In this Second Report and Order, we forbear from applying two additional TOCSIA provisions (1) the requirement that CMRS OSPs regularly publish changes in their operator services, and (2) the requirement that CMRS OSPs and aggregators route emergency calls. We conclude, based on the record in this proceeding, however, that the remaining TOCSIA provisions and our implementing regulations

¹ 47 U.S.C. § 226

² Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 16857 (1998) (*PCIA Forbearance Order and Notice*), recon. denied, FCC 99-250 (rel. Sept. 27, 1999). Although the *PCIA Forbearance Order* and the *Notice* are in the same document, we refer to the *PCIA Forbearance Order* and the *Notice* as if they were separate documents.

³ See *PCIA Forbearance Order and Notice*, 13 FCC Rcd at 16894, ¶ 75.

⁴ 47 U.S.C. §§ 160, 332(c)(1)(A).

⁵ 47 C.F.R. §§ 64.703 – 64.709.

⁶ On September 8, 2000, in the First Report and Order in this proceeding (*First Report and Order*), the Commission addressed the various proposals set forth in the comments to the *Notice* and in the *PCIA Letters*, other than those dealing with TOCSIA Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers, WT Docket No. 98-100, *First Report and Order*, 15 FCC Rcd 17414 (2000).

that apply to CMRS carriers continue to be in the public interest⁷

II. BACKGROUND

A. Forbearance Standard

2 Pursuant to Section 10 of the Act, the Commission is directed to forbear from applying any regulation or provision of the Act to a telecommunications carrier or service, or class of telecommunications carriers or services, in any or some of its geographic markets, if we determine that

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory,

(2) enforcement of such regulation or provision is not necessary for the protection of consumers, and

(3) forbearance from applying such provision or regulation is consistent with the public interest⁸

B. TOCSIA Requirements

3 There are two categories of requirements set forth in TOCSIA and its implementing rules: 1) rules applicable to aggregators and 2) rules applicable to OSPs. "Aggregators" are defined as persons or entities that make telephones available to the public or to transient users of their facilities for interstate telephone calls using a provider of operator services.⁹ "Operator service providers" are defined as common carriers that provide operator services, or any other persons determined by the Commission to be providing operator services.¹⁰ The aggregator and OSP in a given arrangement may be the same entity, or they may be different entities

4 TOCSIA and the Commission's regulations require aggregators to post the following information on or near the telephone instrument, in plain view of consumers: (a) the name, address, and toll-free telephone number of the OSP presubscribed to the telephone;¹¹ (b) a written disclosure that rates for service are available on request, and that consumers have a right to obtain access to the OSP of their choice and may contact their preferred OSP for information on accessing its service using that

⁷ Although the record in this proceeding is five years old, no party has provided us with information, during this period, to persuade us that the market for public mobile phones has changed in ways that make application of TOCSIA a hardship for CMRS service providers. Moreover, to the extent changes have occurred in the public mobile phone market since we released *PCIA Forbearance Order and Notice*, nothing in the record leads us to conclude that these changes are relevant to the issues we are addressing in the proceeding.

⁸ 47 U.S.C. § 160(a). In determining whether forbearance is consistent with the public interest, we consider whether forbearance will promote competitive market conditions, including whether it will enhance competition among existing telecommunications service providers. 47 U.S.C. § 160(b).

⁹ 47 U.S.C. § 226(a)(2), 47 C.F.R. § 64.708.

¹⁰ 47 U.S.C. § 226(a)(9), 47 C.F.R. § 64.708(l).

¹¹ 47 U.S.C. § 226(c)(1)(A)(i), 47 C.F.R. § 64.703(b)(1). A "presubscribed OSP" is the OSP to which the consumer is connected when the consumer places a call using a public telephone without dialing an access code. See 47 U.S.C. § 226(a)(8), 47 C.F.R. § 64.708(h). In the landline context, aggregators generally enter into a contract with an OSP and receive a commission from the OSP for the arrangement.

telephone,¹² (c) in the case of a pay telephone, the local coin rate for the pay telephone location,¹³ and (d) the name and address of the Commission¹⁴

5 In addition, TOCSIA and the Commission's regulations require OSPs to identify themselves, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call¹⁵ They must also disclose immediately to the consumer, upon request and at no charge to the consumer, a quotation of their rates or charges for the call, the methods by which such rates or charges will be collected, and the method by which complaints concerning such rates, charges, or collection practices will be resolved.¹⁶ Further, OSPs must permit the consumer to terminate a telephone call at no charge before the call is connected¹⁷ and must not bill for unanswered telephone calls¹⁸ Also, OSPs must not engage in "call splashing"¹⁹ unless the consumer requests to be transferred to another OSP, the consumer is informed prior to incurring any charges that the rates for the call may not reflect the rates from the actual originating location of the call, and the consumer then consents to be transferred²⁰ Further, except for the foregoing, OSPs must not bill for a call that does not reflect the location of the origination of the call²¹ OSPs also must audibly disclose to consumers how to obtain the price of a call before it is connected²²

6 The regulatory scheme of TOCSIA affirmatively charges OSPs with overseeing aggregator compliance with the statute's aggregator disclosure requirements.²³ In addition, the Commission requires OSPs to regularly publish and make available at no cost to inquiring customers written materials that describe any recent changes in operator services and in the choices available to consumers in that market,²⁴ and the Commission requires OSPs and aggregators to ensure immediate connection of emergency telephone calls to the appropriate emergency service of the reported location of

¹² 47 U.S.C. § 226(c)(1)(A)(ii), 47 C.F.R. § 64.703(b)(2)

¹³ 47 C.F.R. § 64.703(b)(3)

¹⁴ 47 U.S.C. § 226(c)(1)(A)(iii), 47 C.F.R. § 64.703(b)(4)

¹⁵ 47 U.S.C. § 226(b)(1)(A), 47 C.F.R. § 64.703(a)(1)

¹⁶ 47 U.S.C. § 226(b)(1)(C), 47 C.F.R. § 64.703(a)(3)

¹⁷ 47 U.S.C. § 226(b)(1)(B), 47 C.F.R. § 64.703(a)(2)

¹⁸ 47 U.S.C. § 226(b)(1)(F-G), 47 C.F.R. § 64.705(a)(1-2)

¹⁹ "Call splashing" means the transfer of a telephone call from one OSP to another in such a manner that the subsequent OSP is unable or unwilling to determine the location or the origination of the call and because of such inability or unwillingness, is prevented from billing the call on the basis of such location. 47 U.S.C. § 226(a)(3); 47 C.F.R. § 64.708(c)

²⁰ 47 U.S.C. § 226(b)(1)(H), 47 C.F.R. § 64.705(a)(3)

²¹ 47 U.S.C. § 226(b)(1)(I), 47 C.F.R. § 64.705(a)(4)

²² 47 C.F.R. § 64.703(a)(4), *See Billed Party Preference for InterLATA 0+ Calls*, Second Report and Order and Order on Reconsideration, 13 FCC Rcd 6122 (1998).

²³ 47 U.S.C. § 226(b)(1)(D-E), 47 C.F.R. §§ 64.703(e), 64.704(b), 64.705(a)(5)

²⁴ 47 C.F.R. § 64.707. *See also* 47 U.S.C. § 226(d)(3)(B)

the emergency, if known, and, if not known, of the originating location of the call.²⁵

C. PCIA Forbearance Order and Notice

7 In the *PCIA Forbearance Order and Notice*, the Commission addressed a forbearance request by the Broadband Personal Communications Services Alliance of PCIA and decided, *inter alia*, to forbear from two provisions of TOCSIA for all CMRS OSPs.²⁶ One of the TOCSIA-related provisions from which the Commission decided to forbear was the “unblocked access” provision, which allows consumers access to the OSP of their choice. The Commission also forbore from requiring CMRS OSPs to file informational tariffs. However, the Commission concluded that the record was insufficient to support forbearance from the other requirements of TOCSIA. Moreover, with respect to TOCSIA’s disclosure requirements, the Commission declined to forbear because of the “vital information that disclosure provides to consumers” and “because there is no record evidence that these requirements impose an undue burden.”²⁷ Also in the *PCIA Forbearance Order and Notice*,²⁸ the Commission affirmed on reconsideration the *GTE Declaratory Ruling*.²⁹ Concurrently with the release of the *PCIA Forbearance Order*, the Commission issued the *Notice*, in which the Commission, *inter alia*, sought specific information relevant to determining whether, and in what respects, the Commission should forbear from applying or modifying additional TOCSIA requirements in the CMRS context.³⁰

8 GTE Service Corporation (GTE)³¹ and PCIA³² filed comments and reply comments supporting forbearance from application of the TOCSIA provisions to CMRS carriers. Omnipoint Communications, Inc. (Omnipoint) filed comments regarding TOCSIA’s application to calling party pays (CPP) services.³³ AT&T Wireless Services, Inc. (AT&T Wireless) filed an *ex parte* presentation also supporting forbearance.³⁴ No party filed comments opposing forbearance in general.

III. DISCUSSION

9 We decline, with two limited exceptions, to forbear from applying TOCSIA provisions to CMRS aggregators and OSPs. We generally conclude that TOCSIA and our implementing regulations continue to be in the public interest in that their provisions ensure that transient users of mobile telephones designed for public use enjoy the same benefits they would have if they were using their own

²⁵ 47 C.F.R. § 64.706. See also 47 U.S.C. § 226(d)(3)(A).

²⁶ See *PCIA Forbearance Order and Notice*, 13 FCC Rcd at 16894, ¶ 75.

²⁷ *PCIA Forbearance Order and Notice*, 13 FCC Rcd at 16903, ¶ 96.

²⁸ *PCIA Forbearance Order and Notice*, 13 FCC Rcd at 16899-900, ¶¶ 87-88.

²⁹ In the *GTE Declaratory Ruling*, the Common Carrier Bureau found that GTE Airfone, GTE Railfone, and GTE Mobilnet are subject to TOCSIA. *Declaratory Ruling*, 8 FCC Rcd 6171 (Comm. Carr. Bur. 1993) (*GTE Declaratory Ruling*). The Bureau concluded that Airfone, Railfone, and Mobilnet, all GTE subsidiaries, were aggregators within the meaning of TOCSIA because “in the ordinary course of [their] operations, [they] make [] telephones available to the public or to transient users of [their] premises, for interstate telephone calls.” The Common Carrier Bureau also found that it was immaterial to the applicability of TOCSIA that these telephones are not at fixed locations, and that the telephones provided by the GTE subsidiaries are not courtesy telephones, because the consumer, not the telephone provider, pays for the cost of the call.

³⁰ *PCIA Forbearance Order and Notice*, 13 FCC Rcd at 16900-10, ¶¶ 89-110.

³¹ GTE Comments filed August 3, 1998.

³² PCIA Comments filed August 3, 1998.

³³ Omnipoint Comments filed August 3, 1998.

³⁴ AT&T Wireless *Ex Parte* filed December 11, 2002.

private mobile telephones.

10. We forbear, however, from applying two TOCSIA provisions to CMRS aggregators and OSPs where the risks of conflicting mandates compels forbearance and to ensure clarity for public safety. Specifically, we forbear from requiring CMRS OSPs to regularly publish and make available at no cost to inquiring consumers written materials that describe any recent changes in the operator's services and in the choices available to consumers. We find that forbearing from this provision is in the public interest, because other TOCSIA provisions, particularly the call branding and rate disclosure requirements, provide consumers with sufficient information to ensure that rates and practices are just and reasonable and that consumers are protected. Also, we forbear from applying emergency call routing provisions of TOCSIA to CMRS aggregators and OSPs. We find that forbearance in this case to be in the public interest, because the current E911 rules, which apply to the vast majority of CMRS carriers, are sufficient to protect consumers.

11. We analyze below whether the case for forbearing from applying specific TOCSIA provisions currently applicable to CMRS aggregators and OSPs meets the Section 10 forbearance standard. We conclude, based on this record, that the case for forbearing from applying TOCSIA provisions applicable to CMRS aggregators and OSPs fails to satisfy the Section 10 forbearance standard in all but two cases – *OSP publication of changes in services and routing of emergency calls* by “covered CMRS” OSPs. We find that the information in the record does not justify a departure from the Commission's 1998 determination that grounds do not exist to support complete forbearance from applying all of the provisions of TOCSIA and the Commission's implementing regulations to CMRS OSPs and aggregators.³⁵

A. Aggregator Disclosure

12. *Background.* Under our rules, CMRS aggregators are required to post the following information on or near the telephone instrument, in plain view of consumers: (a) the name, address, and toll-free telephone number of the OSP presubscribed to the telephone, (b) in the case of a pay telephone, the local coin rate for the pay telephone location,³⁶ and (c) the name and address of the Commission.³⁷

13. In the *Notice*, the Commission tentatively concluded that it should continue to require some form of disclosure by CMRS aggregators similar to that mandated by TOCSIA.³⁸ The Commission noted, however, that due to the increasing diminution in size of CMRS telephone devices, it may be impossible to post all of the required information, in a legible fashion, on the telephone instrument itself.³⁹ Accordingly, the Commission tentatively concluded to forbear from requiring CMRS aggregators to post disclosure information “on or near the telephone instrument,” and to instead permit some or all CMRS aggregators to use some other reasonable means of disclosure.⁴⁰

14. *Discussion.* We decline to adopt our tentative conclusion to forbear from requiring aggregators to “post” disclosure information “on or near the telephone instrument,” in the CMRS context. We recognize that, due to the diminutive size of many mobile phones today, the requisite legible

³⁵ See *PCIA Forbearance Order and Notice*, 13 FCC Rcd at 16900, ¶ 89.

³⁶ 47 C.F.R. § 64.703(b)(3).

³⁷ 47 U.S.C. § 226(c)(1)(A)(iii), 47 C.F.R. § 64.703(b)(4).

³⁸ *PCIA Forbearance Order and Notice*, 13 FCC Rcd at 16903, ¶ 96.

³⁹ *PCIA Forbearance Order and Notice*, 13 FCC Rcd at 16903-04, ¶ 97.

⁴⁰ *Id.*

disclosure language may not practically fit “on” the mobile phone. We find that forbearance in this case is unnecessary, however, because it is entirely practicable to post disclosure information “near” the mobile phone. In the mobile phone context, aggregators will be in compliance with TOCSIA if they post the necessary information “near” the mobile phone so that it is received by and can be kept by end-user customers. For example, CMRS aggregators will be in compliance with TOCSIA if they give printed documentation to the customer. CMRS aggregators may, for example, provide the required information to the consumer at the point of establishing a contractual relationship, *e.g.*, at the car rental counter or concierge desk.⁴¹

15. We find that aggregator disclosure requirements are, at a minimum, necessary to protect consumers, as required under the second prong of Section 10. We continue to believe that these requirements provide vital information to consumers of telecommunications services designed for public use, and there is no evidence in the record that these requirements impose an undue burden on aggregators. With our decision here not to forbear from enforcing these provisions, we ensure that customers of CMRS aggregators will benefit from access to the same information that is available to direct customers of CMRS providers, including the identity of and how to contact the underlying service provider, how to obtain information on rates, and how to lodge complaints about service.

B. OSP Oversight of Aggregators

16. *Background.* Responsibility for enforcement of the aggregator disclosure requirements is, in addition to being placed on the aggregator as described above, placed upon the OSP used by the aggregator. Under TOCSIA and our implementing regulations, an OSP is obligated to ensure, by contract or tariff, that each aggregator for which such provider is the presubscribed provider of operator services is in compliance with the aggregator disclosure requirements.

17. In the *Notice*, the Commission tentatively concluded that it should retain the requirement that CMRS OSPs ensure by contract or tariff that aggregators will comply with the disclosure requirements.⁴² PCIA contends that the realities of the wireless industry make OSP oversight impossible because CMRS OSPs typically do not have contracts with aggregators, and indeed may not know who aggregators of their services are. The Commission therefore sought comment regarding the prevalence of contractual arrangements between CMRS aggregators and OSPs and on whether OSPs that do not have contracts with their aggregators, or do not know who their aggregators are, should be exempt from the oversight requirement.⁴³

18. *Discussion.* Consistent with our tentative conclusion, we find that the OSP oversight requirement is a necessary business tool to ensure that aggregators comply with their TOCSIA obligations. In situations where, for example, the CMRS carrier agrees to a contractual arrangement with an aggregator whereby it directly imposes charges upon members of the public, we find no basis for justifying forbearance from TOCSIA. Although the potential for abuse has been claimed to come from

⁴¹ We note that before TOCSIA was enacted, we proposed to afford aggregators the option of meeting their disclosure obligations by giving printed documentation to the customer in person. We provided as examples that a customer at a hotel or a patient at a hospital could be given the required information while checking in. Policies and Rules Concerning Operator Service Providers, *Notice of Proposed Rule Making*, 5 FCC Rcd. 4630, 4632, ¶ 17 (1990) (*OSP Notice*). These examples, however, would apply only in the wireless context to CMRS aggregators, not in the wireline context. We will continue to require all non-CMRS aggregators to comply with the posting requirement of 47 C.F.R. § 64.703(b) as described in Policies and Rules Concerning Operator Service Providers, *Report and Order*, 6 FCC Rcd 2744, 2759, ¶ 36 (1991) (*TOCSIA Implementing Order*).

⁴² *PCIA Forbearance Order and Notice*, 13 FCC Rcd at 16905, ¶ 100.

⁴³ *Id.*

the aggregator because it is the aggregator that may most effectively take advantage of the consumer, in this particular context involving the existence of a contractual arrangement, the CMRS OSP may wield an important business influence over the aggregator. Similar to the wireline context, we cannot forbear under the first prong of Section 10 when this rule requiring such a business influence may serve to prevent potential abuses before they occur. In addition, we do not believe this business function to be insignificant to protecting the consumer under the second prong of the Section 10 forbearance standard.

19 Under TOCSIA, each OSP must ensure by contract or tariff that each aggregator with which it has contracted is in compliance with its disclosure obligations.⁴⁴ In the absence of a contract or tariff with an aggregator to provide OSP services or knowledge of the aggregator's activities, the OSP is not responsible for ensuring aggregator compliance. Section 226(b)(1)(D) requires that each provider of operator services shall "ensure, by contract or tariff, that each aggregator for which such provider is a presubscribed provider of operator services is in compliance" with the aggregator service provisions of TOCSIA. This provision presupposes the existence of a sufficient nexus between aggregator and OSP such that a contract or tariff would be the appropriate mechanism on which to base the oversight requirement. To the extent that a CMRS OSP has a contractual relationship with an aggregator of its service, the CMRS OSP must have a provision in the relevant contract requiring aggregator compliance with TOCSIA and the Commission's related rules.⁴⁵ If a CMRS OSP lacks a contractual relationship with an aggregator or has no knowledge of the aggregator, the statutory text does not require such oversight by the CMRS OSP. Accordingly, PCIA's and AT&T Wireless' concerns that it would be impossible for a CMRS provider serving a mobile public phone roamer to enforce compliance by the owner aggregator of the mobile public phone because the CMRS provider will have no contractual or tariff relationship with the aggregator, are moot.⁴⁶

C. OSP Identification and Rate Disclosure

20 *Background.* TOCSIA and our regulations also impose a number of requirements upon CMRS OSPs. OSPs must identify themselves, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call, a practice referred to as "call branding."⁴⁷ OSPs must also permit the consumer to terminate a telephone call at no charge before the call is connected. They must also disclose immediately to the consumer, upon request and at no charge to the consumer, a quotation of their rates or charges for the call, the methods by which such rates or charges will be collected, and the method by which complaints concerning such rates, charges, or collection practices will be resolved. Finally, the Commission recently added a requirement that OSPs must audibly disclose to consumers how to obtain the price of a call before it is connected.⁴⁸

⁴⁴ See 47 U.S.C. § 226(b)(1)(D).

⁴⁵ *Id.* In 1994, the Commission adopted a mandatory detariffing policy for providers of domestic CMRS and reiterated its conclusion that "non-dominant carriers are unlikely to behave anticompetitively, in violation of Sections 201(b) and 202(a) of the Act, because they recognize that such behavior would result in a loss of consumers." Implementation of sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411, 1478 (1994), *citing*, Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations, *First Report and Order*, 85 FCC 2d 1, 31.

⁴⁶ PCIA Comments at 9.

⁴⁷ Call branding "is the process by which an OSP audibly and distinctly identifies itself to every person who uses its operator services." *OSP Notice*, 5 FCC Rcd at 4632. The OSP is required to brand the call at the beginning of each call and again before the customer incurs any charge for the call. See 47 C.F.R. §§ 64.703(a), 64.703(c), 47 U.S.C. § 226(b)(1)(A). *GTE Declaratory Order*, 8 FCC Rcd at 6172, note 16.

⁴⁸ 47 C.F.R. § 64.703(a)(4).

21. In the *Notice*, the Commission sought additional comment on whether the OSP disclosure and call termination requirements are unnecessary to protect consumers because CMRS providers' rates and practices are reasonable, competitive market forces motivate CMRS providers to offer services at reasonable rates, and CMRS providers generally disclose rate information as a matter of sound business practice. In addition, given existing billing practices in the CMRS context, it sought information on whether, and under what circumstances, end users are billed by aggregators, OSPs, or both.

22. *Discussion.* We decline to forbear from applying these TOCSIA provisions against CMRS aggregators and OSPs. In the *Notice*, the Commission asked questions designed to elicit specific information relevant to determining whether and in what respects the Commission could forbear from applying these provisions to CMRS providers. We find that the record does not justify deviating from the Commission's ruling in the *PCIA Forbearance Order* that these TOCSIA provisions should apply to the actions of CMRS providers.

23. In the *PCIA Forbearance Order*, the Commission concluded that, based on the record at that time, the criteria for forbearance from applying OSP identification, disclosure and call termination requirements to CMRS OSPs were not satisfied.⁴⁹ The record remains insufficient to support the conclusion that enforcement of these TOCSIA requirements is not necessary to ensure that the charges and practices are just and unreasonable, as required under the first prong of Section 10. PCIA contends, for example, that the Commission should forbear from enforcing these provisions because providers typically act reasonably and disclose their rates as a part of good business practices and that deploying call branding capabilities is expensive and confusing to consumers in a roaming context.⁵⁰ This argument in support of forbearance, however, is conclusory and not fully responsive to the specific questions the Commission posed in the *Notice*.

24. Further, the record is insufficient to support the conclusion that enforcement of these TOCSIA requirements is not necessary to protect consumers, as required under the second prong of Section 10. In the CMRS context, TOCSIA's primary requirement is that an OSP identify itself and, upon request, provide information about rates and how to file a complaint with the Commission. This branding requirement affords clear protection to consumers by ensuring that they have basic information needed to decide whether or not to incur charges for OSP-supported calls. Removing the requirement could put consumers at risk of not having access to this information, which we find would be violative of the consumer protection prong of Section 10.

25. We also find that the record does not support the contention that requiring CMRS carriers to brand calls would cause customer confusion or impose unacceptably high costs on carriers. PCIA contends that branding can cause customer confusion because CMRS providers cannot always distinguish between calls from mobile phones designed for public use and other calls. GTE similarly contends that, absent an ability to identify a call as originating from an aggregator, CMRS carriers would have to brand every wireless call in order to comply with TOCSIA requirements.⁵¹ We are not persuaded by these arguments. First, while the OSP branding requirement of TOCSIA applies to calls initiated from aggregator locations that involve automatic or live assistance to the consumer to arrange for billing or call completion, it does not apply to calls that are automatically completed with billing to the telephone from which the call originated, or to calls that are completed through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.⁵² Accordingly,

⁴⁹ See *PCIA Forbearance Order and Notice*, 13 FCC Rcd at 16906, ¶ 102, citing, *PCIA Forbearance Order and Notice*, 13 FCC Rcd at 16898-99, ¶ 86.

⁵⁰ PCIA Comments at 13.

⁵¹ GTE Comments at 11.

⁵² 47 U.S.C. § 226(a)(7).

TOCSIA's branding requirement does not apply to the vast majority of wireless calls that consumers make within their home calling areas, which are typically automatically completed and billed to the caller's telephone.

26. Second, we are not persuaded by PCIA's argument that the branding requirement will cause confusion or be unduly burdensome in the roaming context. In most cases, roaming is accomplished through automatic roaming arrangements that provide for automated completion and direct billing of calls. Thus, as in the case of automatically placed and billed calls within the caller's home area, automatic roaming calls are not subject to TOCSIA. On the other hand, the branding requirement does potentially apply to manual roaming calls made from aggregator phones, because such calls are not automatically billed to the originating number but are typically paid for by credit card. PCIA asserts that, in order to comply with this requirement, CMRS OSPs would have to brand all roaming calls that are not billed to the originating number,⁵³ without knowing whether the caller is using an aggregator phone. We do not believe this to be a significant burden for several reasons. First, because manual roaming calls make up a small percentage of all wireless calls, the number of calls that will actually require branding is quite small. Further, the commenters fail to explain how branding all manual roaming calls would result in significant costs to carriers or customer confusion. Because manual roaming calls require preliminary communication between the OSP and the caller to arrange for credit card billing, CMRS OSPs are likely to identify themselves and explain their billing requirements to end-user customers in any event, and we believe that such identifications and disclosures can, with minimal modifications, be made to comply with TOCSIA. In any case, we believe that the benefits associated with requiring compliance with TOCSIA when manual roaming calls are made from aggregator phones outweigh the potential costs that commenters have suggested would be associated with ensuring such compliance. Moreover, if carriers seek to avoid unnecessary branding of manual roaming calls from non-aggregator phones, they are free to devise and implement methods to distinguish aggregator from non-aggregator calls.

27. Finally, GTE argues that the rate disclosure requirement is of little use because the rates charged for wireless public phones are typically set by aggregators and that the OSP rates disclosed by the OSP would be only a portion of the overall rate for the call.⁵⁴ GTE is mistaken about the rate disclosure requirement. The OSP's obligation is merely to inform the consumer of the rates it bills for and how to obtain the total cost of the call, including any aggregator surcharge. The OSP is not obliged to guess the aggregator's rate if not billed for by the OSP.⁵⁵ With this important rate information from the aggregator and the OSP, the consumer can make an informed decision as to whether to place the call.⁵⁶

D. Call Splashing

28. *Background.* TOCSIA and the implementing regulations prohibit OSPs from engaging in "call splashing" or billing for a call that does not reflect the originating location of the call without the consumer's informed consent.⁵⁷ In the *Notice*, the Commission sought detailed information on the costs

⁵³ PCIA Comments at 13.

⁵⁴ GTE Comments at 8-9.

⁵⁵ 47 U.S.C. § 226(b)(1)(C).

⁵⁶ In the *Notice*, the Commission sought comment on TOCSIA's provision prohibiting OSPs from billing for unanswered telephone calls. See *PCIA Forbearance Order and Notice*, 13 FCC Rcd at 16907-8, ¶ 105. We find, pursuant to 47 U.S.C. § 226(b)(1)(F-G) and 47 U.S.C. § 332(c)(8), that the billing for unanswered calls provision of TOCSIA does not apply to CMRS carriers, and this issue is, therefore, moot in the CMRS context.

⁵⁷ 47 U.S.C. § 226(b)(1)(H-I), 47 C.F.R. § 64.705(a)(3-4). "Call splashing" occurs when a call is transferred from one OSP to another, and the second OSP cannot determine the origination point of the call, and the customer's bill reflects a different origination point (and possibly, different charges). 47 U.S.C. § 226(a)(3), 47 C.F.R. § 64.708(c). Example

to CMRS OSPs of complying with the call splashing prohibition for calls made through aggregators and, to the extent that CMRS providers cannot distinguish between customers of aggregators and other users, the costs of complying with this prohibition on other calls as well.⁵⁸

29 *Discussion.* We decline to forbear from applying the call splashing provisions of TOCSIA against OSPs. In the *Notice*, the Commission asked questions designed to elicit specific information relevant to determining whether and in what respects the Commission could forbear from applying these provisions to CMRS providers. We find that the record does not justify deviating from the Commission's ruling in the *PCIA Forbearance Order* that these TOCSIA provisions apply to the actions of CMRS providers. In response to our request for comment, PCIA and AT&T Wireless submitted no cost estimates, and simply argued that because of flat toll pricing, call splashing, even if it occurred, would not adversely affect charges to consumers and that there is no evidence of complaints that such a practice has been a problem in the CMRS context.⁵⁹ We reject PCIA's and AT&T's contention that flat toll pricing has eliminated all possible adverse effects of call splashing. Even today, there are many wireless calling plans that do not include free long distance service and therefore providers will charge distance sensitive rates in some instances. Moreover, we believe that any costs of CMRS OSPs meeting these requirements are minimal.

30 We also cannot conclude, based on this record, that enforcement of these TOCSIA requirements is not necessary to protect consumers, as required under the second prong of Section 10. Based on the record before us on this issue, which is essentially the same record the Commission used in adopting the *Notice*, we make a finding under Section 10 that the prohibition of call splashing, unless the consumer is informed and consents, continues to protect consumers from being billed for calls that do not reflect their originating points and allows consumers to make an informed decision to have calls splashed.

31. Further, we disagree with the arguments of PCIA that a lack of complaints against CMRS aggregators and OSPs necessarily indicate the absence of a problem for any of the rules to address.⁶⁰ The absence of complaints filed with the Commission is not enough to support full forbearance at a time when the market for CMRS activities affected by TOCSIA remains limited. Central to the operation of the OSP rules is the provision of information to the consumer that, if provided, is intended to obviate the need for complaints. We therefore find that it is in the public interest to continue to apply this requirement to CMRS offerings that are subject to TOCSIA and our regulations.

(continued from previous page)

A consumer in a hotel in Washington D C wishes to place a call using a calling card from her chosen interexchange carrier (IXC) to Baltimore, MD. The presubscribed OSP for that hotel is based in Chicago. The OSP is unable to accept the calling card, so the caller asks the OSP to transfer the call to an operator of her chosen IXC. The operator of the consumer's carrier of choice is unaware that the call is originating in Washington. The customer is, therefore, billed for a call from Chicago to Baltimore, rather than from Washington to Baltimore.

Call splashing is allowed when the consumer requests to be transferred to another OSP, the consumer is notified in advance that the rates for the call may not reflect the rates from the actual originating location of the call, and the consumer thereafter consents to be transferred. See 47 C.F.R. § 64.705(a)(3), 47 U.S.C. § 226(b)(1)(H).

⁵⁸ *PCIA Forbearance Order and Notice*, 13 FCC Rcd at 16909, ¶ 107.

⁵⁹ PCIA Comments at 14-15.

⁶⁰ PCIA Comments at 2.

E. OSP Publication of Changes in Services

32 *Background* Pursuant to the relevant provision of TOCSIA,⁶¹ the Commission has required OSPs to regularly publish and make available at no cost to inquiring consumers written materials that describe any recent changes in operator services and in the choices available to consumers in that market.⁶² In the *Notice*, the Commission sought comment on the costs and benefits of requiring CMRS OSPs to publish regular reports of their changes in light of the nature of the services provided, the level of abuses, and carriers' customer disclosure practices

33 *Discussion.* We forbear from applying the OSP publication provision of TOCSIA against CMRS OSPs. In this instance, we find that enforcement of these TOCSIA requirements is not necessary to ensure that charges and practices are just and reasonable or to protect consumers. We also find that forbearance from applying these requirements is in the public interest

34 As service providers not bound by rate regulation or publication requirements, CMRS carriers are generally not required to publish their rates and contract terms even though many of them do in order to remain competitive.⁶³ Singling out particular CMRS services – such as CMRS OSPs – for disparate treatment does not serve the public interest. Fluid and rapid price competition has long typified wireless services. This is especially true when the call branding and rate disclosure requirements of TOCSIA ensure that consumers of CMRS OSP services are given the CMRS OSP identification, terms and rate information they need to make an informed decision on whether to place a call on a CMRS aggregator phone. More specifically, at their request, consumers will be informed of the methods by which such rates or charges will be collected and the method by which complaints concerning such rates, charges, or collection practices will be resolved. The consumer would also be informed of how to obtain the price of a call before the call is connected, including any aggregator surcharge.⁶⁴ We conclude that these call branding and rate disclosure requirements, which require CMRS OSPs to provide their identity, and rate or charge information, is sufficient to ensure just and reasonable charges and practices from CMRS OSPs.⁶⁵ In that regard, we also find that enforcement of the OSP publication provision is not necessary for the protection of consumers precisely because of the unique incentives CMRS OSPs have to advertise their services and make information important to consumers available as a matter of sound business practice.⁶⁶ In addition, we find that there are important public interest benefits associated with reducing regulatory compliance costs (*i.e.*, those costs associated with the creation of the required reports, databases, personnel training, mailing, *etc.*), in light of the fact that those cost reductions can be translated into lower prices to consumers.⁶⁷ Finally, however, we encourage CMRS OSPs to provide voluntarily to inquiring consumers information that describes recent changes in operator services and in the choices available to consumers in the CMRS OSP market. We note that CMRS OSPs may make this information available to consumers by, for example, updating information on their websites

⁶¹ 47 U.S.C. §226(d)(3)(B)

⁶² 47 C.F.R. § 64.707

⁶³ 47 C.F.R. § 42.11(a). This is contrasted by the publication requirements imposed on wireline carriers. 47 C.F.R. § 42.10 and 47 C.F.R. § 42.11

⁶⁴ 47 C.F.R. § 64.703(a)(4). We also note that the aggregator, in its disclosure, will provide the consumer with the name and toll-free telephone number of the aggregator's OSP

⁶⁵ Often, CMRS OSPs find they must publish their rates and contract terms in advertising in order to attract new customers in this highly competitive market. PCIA Comments at 16

⁶⁶ PCIA Comments at 15-16

⁶⁷ See PCIA Comments at 16

F. Routing of Emergency Calls

35 *Background* TOCSIA requires that the Commission “establish minimum standards for providers of operator services and aggregators to use in the routing and handling of emergency telephone calls.”⁶⁸ Under our rules implementing this provision, OSPs and aggregators are required to ensure immediate connection of emergency telephone calls to the appropriate emergency service of the reported location of the emergency, if known, and if not known, of the originating location of the call.⁶⁹

36 Under the Commission’s rules, certain mobile wireless licensees are required to implement basic 911 and enhanced 911 (E911) services.⁷⁰ Cellular licensees, broadband Personal Communications Service (PCS) licensees, and certain Specialized Mobile Radio (SMR) licensees,⁷¹ collectively “covered carriers,”⁷² are required to meet basic and enhanced 911 service requirements for completing emergency calls, including forwarding all 911 calls without delay⁷³ and relaying a caller’s Automatic Number Identification (ANI) and Automatic Location Information (ALI) to the appropriate Public Safety Answering Point (PSAP).⁷⁴

37 *Discussion* We forbear from applying the emergency call routing provision of TOCSIA to CMRS aggregators and OSPs because the current E911 regulatory regime, which applies to the vast majority of CMRS OSPs, is clearer and more comprehensive than the TOCSIA requirements to protect consumers. The E911 rules make more comprehensive emergency service requirements applicable to “covered CMRS” carriers and we see no reason to also apply the duplicative and potentially confusing and conflicting emergency call routing requirements that are a part of TOCSIA. In applying the forbearance standard, we first find that enforcement of the emergency call routing provision is not necessary to ensure just and reasonable charges and practices. Due to the potential for conflicting requirements and confusion, we believe our current E911 rules better define a standard for reasonable practices as they relate to call routing. Second, we find that enforcement of the TOCSIA emergency call

⁶⁸ 47 U.S.C. § 226(d)(3)(A).

⁶⁹ 47 C.F.R. § 64.706.

⁷⁰ See Revision of the Commission’s Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 18676 (1996) (*E911 First Report and Order*).

⁷¹ The Commission’s E911 requirements covered only SMR licensees that held either licenses or authorizations to operate 800 MHz or 900 MHz service. *E911 First Report and Order*, 11 FCC Rcd 18676, 18716-18 at paras. 80-84. “Covered SMR” also included those 800/900 MHz SMR licensees that offered real-time, two-way switched voice service that was interconnected with the public switched network, either on a stand-alone basis or packaged with other telecommunications services. *E911 First Report and Order*, 11 FCC Rcd 18676, 18716-18 at paras. 80-84.

⁷² *Id.* at 18716-18 paras. 80-84.

⁷³ See *E911 First Report and Order*, 11 FCC Rcd at 18692-97 paras. 29-42 (requiring covered carriers to transmit all 911 calls without subjecting them to any call validation procedures). Covered carriers are defined as licensees (1) that offered real-time, two-way switched voice service, interconnected with the public switched network, either on a stand-alone basis or packaged with other telecommunications services, (2) whose customers clearly expected access to 911 and E911, (3) that competed with analog and broadband PCS providers, and (4) where it is technically and operationally feasible to provide enhanced 911 service.

⁷⁴ *E911 First Report and Order*, 11 FCC Rcd 18676, 18689-18722 paras. 24-91. Recognizing the need for vigorous implementation of the E911 requirements, the Commission adopted a phased implementation plan for the covered carriers. Phase I implementation, which requires a covered carrier to transmit a 911 caller’s call-back number and cell site to the appropriate PSAP, began on April 1, 1998. See 47 C.F.R. § 20.18(d). Phase II implementation, which requires a covered carrier to transmit a 911 caller’s location information to the appropriate PSAP, began on October 1, 2001. See 47 C.F.R. § 20.18(e), (h).

routing provision is not necessary for the protection of consumers, because the more stringent E911 requirements will continue to be applicable to "covered CMRS" carriers. In this regard we agree with PCIA and AT&T Wireless that the rules are duplicative and the E911 rules should preempt.⁷⁵ Finally, we find that forbearance from applying TOCSIA's emergency call routing provision is consistent with the public interest because we are eliminating redundant obligations.

G. Other Issues

38 Finally, we note that GTE has requested, as in earlier proceedings,⁷⁶ that its Airfone and Railfone services be treated differently than other CMRS providers and that the Commission take action that reflects "the unique character" of its services.⁷⁷ We find no compelling reason to reverse our decision in *PCIA Forbearance Order* where we affirmed the decisions in the *GTE Declaratory Ruling* that TOCSIA applies to the actions of certain GTE affiliates. Consequently, we conclude that GTE's Airfone and Railfone services must comply with TOCSIA provisions fully.

39 Omnipoint argues that TOCSIA should not apply to customer notification processes associated with a CMRS calling party pays (CPP) service or, in the alternative, the Commission should forbear from such regulation of CPP.⁷⁸ There is no indication in this record or in our experience that CPP services are being provided by any CMRS carriers. Further, on April 9, 2001, the Commission terminated the calling party pays proceeding. In its *Termination Order*,⁷⁹ the Commission stated that regulations were not necessary to govern calling party pays services and that lower prices and new pricing plans offered many of the same benefits that calling party pays services would.⁸⁰ The Commission also stated that if the need arose, it could initiate a new proceeding and gather a fresh record to consider rules to govern the offering of calling party pays services.⁸¹ In light of this, we find no reason to resolve Omnipoint's arguments in this proceeding. We can resolve CPP/TOCSIA issues if and when we initiate a new calling party pays proceeding.

⁷⁵ *Id.*

⁷⁶ See *PCIA Forbearance Order and Notice*, 13 FCC Rcd at 16899-900, ¶¶ 87-88. See *GTE Declaratory Order*, 8 FCC Rcd at 6173, ¶¶ 8-11, 31.

⁷⁷ GTE Comments at 13. Specifically, in the Railfone context, GTE urges the Commission to 1) forbear from enforcing the call branding requirement, 2) require only 800 access, and 3) forbear from enforcing the requirement that OSPs and aggregators ensure the immediate connection of emergency telephone calls. In the Airfone context, GTE urges the Commission to 1) find that Airfone's method of informing customers of its identity is sufficient (GTE claims that it identifies itself to callers through literature made available to passengers, through words printed on handsets or appearing on LCD screens, and through seat pocket cards), 2) require only 800 access, and 3) forbear from enforcing the requirement that OSPs and aggregators ensure the immediate connection of emergency telephone calls. GTE Comments at 13.

⁷⁸ Omnipoint Comments at 1.

⁷⁹ *Calling Party Pays Service Offering in the Commercial Mobile Services*, WT Docket No. 97-207, *Memorandum Opinion and Order on Reconsideration and Order Terminating Proceeding*, 16 FCC Rcd 8297 (2001) (*Termination Order*).

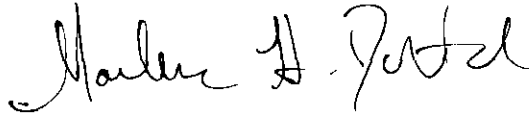
⁸⁰ *Termination Order*, 16 FCC Rcd at 8304-5, ¶ 24.

⁸¹ *Id.*

IV. ORDERING CLAUSE

40 Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), 10 and 11 of the Communications Act of 1934, as amended, 47 U S C sections 154(i), 154(j), 160 and 161, this Second Report and Order IS ADOPTED

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, appearing to read "Marlene H. Dortch".

Marlene H Dortch
Secretary